UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/1998/39/Add.4
5 March 1998

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Fifty-fourth session
Item 8 of the provisional agenda

QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy, submitted pursuant to Commission on Human Rights resolution 1997/23

Addendum

Report on the mission of the Special Rapporteur to the United Kingdom of Great Britain and Northern Ireland

GE.98-10716 (E)

CONTENTS

	Paragraphs	Page
Introduction	1 - 11	3
I. GENERAL BACKGROUND	12 - 14	6
II. INTIMIDATION AND HARASSMENT OF LAWYERS	15 - 38	6
III. ACCESS TO COUNSEL	39 - 55	13
A. Deferrals of access	39 - 42	13
B. The right to have a solicitor present during police interrogations	43 - 47	14
C. Closed visits	48 - 53	15
D. Proposal for a Legal Advice Unit: Independent Commissioner for Holding Centres	54 - 55	17
IV. VIDEO AND AUDIO-RECORDING OF POLICE INTERVIEWS	56 - 59	17
V. MURDER OF PATRICK FINUCANE	60 - 74	18
VI. EMERGENCY LEGISLATION AND ORDINARY CRIMINAL LAW	75 - 83	22
A. Right to Remain Silent	77 - 80	23
B. Admissibility of Confession Evidence	81 - 82	24
C. Diplock Courts	83	25
VII. OTHER ISSUES	84 - 88	25
A. "Bugging"	84 - 87	25
B. Incorporation of the European Convention on Human Rights	88	26
VIII. CONCLUSIONS AND RECOMMENDATIONS	89 - 98	27

INTRODUCTION

1. The present report concerns a fact-finding mission to the United Kingdom of Great Britain and Northern Ireland undertaken from 20 to 31 October by the Special Rapporteur on the independence of judges and lawyers, pursuant to Commission on Human Rights resolution 1994/41 of 4 March 1994, as renewed by resolution 1997/23 of 11 April 1997 extending the mandate for a further period of three years. This mandate calls upon the Special Rapporteur *inter alia* to inquire into any substantial allegations transmitted to him and report his conclusions thereon.

2. In both his second and third annual reports submitted to the fifty-second and fifty-third sessions respectively of the Commission on Human Rights, the Special Rapporteur reported on allegations received concerning the harassment and intimidation of solicitors by police officers of the Royal Ulster Constabulary (RUC) of Northern Ireland. (E/CN.4/1996/37, paras. 228-240 and E/CN.4/1997/32, paras. 177-179.) Further, he reported on allegations he had received on measures implemented by the Government that hamper the unfettered access by "exceptional high risk" prisoners to legal advice.

3. In response to a report submitted by British Irish Rights Watch to the Special Rapporteur, the Independent Commissioner for the Holding Centre for Northern Ireland transmitted a memorandum dated 17 January 1997 to the Special Rapporteur expressing the view, *inter alia*, that he might favour "an independent investigation into the nature and extent of any intimidation of defence solicitors". (E/CN.4/1997/32, para. 178.)

4. In light of the response from the Independent Commissioner, as well as a response from the Chairman of the General Council of the Bar of Northern Ireland, the Special Rapporteur sought by a letter dated 21 February the permission of the Government of the United Kingdom of Great Britain to visit Northern Ireland for an *in situ* investigation into the allegations he had received on the situation in Northern Ireland. The Government replied favourably to this request in a letter dated 10 March 1997.

5. The issues to be examined by the Special Rapporteur during the course of the mission were set forth in a letter dated 4 April 1997 to the Permanent Representative of the United Kingdom to the United Nations Office at Geneva. The issues were summarized as follows:

(a) There have been consistent reports of alleged systematic abuse of defence lawyers in Northern Ireland by certain police officers since 1992. There have also been reports of similar abuse, although to a lesser degree, in England. More recently, there has been reported an increase of such abuses in Northern Ireland, associated with an increase in arrests under the emergency laws;

(b) There has been concern expressed over a number of provisions that restrict access to legal advice. These include: (i) deferrals of access to a solicitor for periods of up to 48 hours under emergency laws, (ii) refusal to

allow solicitors to remain present during police interviews in Holding Centres in Northern Ireland, (iii) closed visits for the purpose of legal consultations for certain prisoners in England;

(c) There is concern about the absence of safeguards to prevent abuse of lawyers, such as video and audio-recording of police interviews;

(d) There have been serious allegations received concerning the unresolved murder of Belfast solicitor Patrick Finucane, which claim that there was official collusion in his death;

(e) There have been concerns expressed that certain provisions in the emergency legislation (e.g., absence of a jury, lower threshold for admissibility of confession evidence) and in the ordinary criminal law (e.g., the abrogation of the right to silence) impinge on the ability of the judiciary to function impartially and independently;

(f) There have been concerns expressed that the provisions of the Police Act which do not exempt lawyers' offices from bugging undermine the lawyer/client privilege.

6. However, the primary focus of the Special Rapporteur's mission was issues (a) and (b), owing to concerns expressed for many years, both domestically and internationally.

7. During the course of his mission, the Special Rapporteur travelled to London, from 20 to 22 October, and to Belfast, from 23 to 31 October. In London the Special Rapporteur held consultations with the following Government representatives: the Lord Chief Justice of England and Wales, Lord Bingham; the Minister of State, Home Office, Mr. Alun Michael, MP; Mr Tony Pearson, Director of Security and Programmes Prison Service; Mr. Peter Wrench, Head of Policing and Organized Crime Unit, Home Office; General Sir David Ramsbottom, Her Majesty's Chief Inspector of Prisons, Home Office. The Special Rapporteur was also scheduled to meet with Mr. Tony Lloyd, MP, Minister of State, Foreign and Commonwealth Office, but owing to an unavoidable delay in his schedule the Special Rapporteur was unable to meet the Minister. In Belfast the Special Rapporteur held consultations with the following Government representatives: Mr. Paul Murphy, MP, Minister of State, Northern Ireland Office; Mr. Ronnie Flanagan, Chief Constable of the Royal Ulster Constabulary, and Assistant Chief Constable, Mr. Raymond C. White; Mr. Roy Spence, Chairman of the Community Relations Committee and David Sterling of the Police Authority for Northern Ireland; Mr. Steele, Senior Director of Security Policy, Northern Ireland Office; Mr. Nick Perry, Head of Security Policy and Operations Branch, Northern Ireland Office; Mr. Alastair Frasier, Director of Public Prosecution for Northern Ireland; Sir Louis Blom-Cooper, Commissioner for the Holding Centres; Mr. Murray Power, Head of Criminal Justice Policy Division, Northern Ireland Office; Lord Carswell, Lord Chief Justice of Northern Ireland and the Honorable Justice Kerr; Mr. Geoff Huggins, Police and Planning Division, Northern Ireland Prison Service; Mr. Michael Lavery, Q.C., Chairman, and Ms. Denise Magill, Legal Officer, Standing Advisory Commission on Human Rights; 1/ Mr. Paul Donnelly, Chairman, and Mr. Brian McClelland

of the Northern Ireland Independent Commission for Police Complaints; Mr. Glenn Thompson, Director, and Mr. Hugh Ritchie, Deputy Director, Northern Ireland Court Service.

8. In London, the Special Rapporteur also met with the following private individuals and non-governmental organizations: Ms. Jane Winter, Director, British Irish Rights Watch; Mr. Peter Norlander, Justice; Mr. Roger Pannone, Chairman of the Working Party on International Human Rights, Law Society of England and Wales; Ms. Jane Deighton and Mr. Geoffrey Bindman, Law Society of England and Wales; Halya Gowan, Amnesty International; Ms. Gareth Peirce, Solicitor. In Belfast the Special Rapporteur met with the following private individuals and non-governmental organizations: Mr. Martin O'Brien, Director, and Mr. Paul Mageean, Legal Officer, Committee on the Administration of Justice, Northern Ireland; Mrs. Geraldine Finucane and family; Mr. Eugene Grant, Q.C., Chairman of the Bar Council; Mr. Alistair Rankin, Chairman, Mr. Richard Monteith, Chairman, Human Rights Committee; Mr. Barra McGory, Chairman, Criminal Law Society, Law Society of Northern Ireland. The Special Rapporteur also met with a large number of solicitors and barristers who were able to provide him testimony on the forms of harassment they have experienced. For the sake of confidentiality, the Special Rapporteur is of the view that it would be inappropriate to name those with whom he met during the course of his mission in Northern Ireland unless explicitly authorized by the solicitor to do so, but he is indebted to them for the extensive testimony they provided. He would like to emphasize that he met with solicitors who represented clients on both sides of the political divide in Northern Ireland and who had shared experiences of police harassment and intimidation.

9. During the course of the mission the Special Rapporteur also visited HM Prison Belmarsh in London, Gough Barracks in Armagh, Northern Ireland, Castlereagh Holding Centre in Belfast, HM Prison Maghaberry and HM Prison Maze. The Special Rapporteur visited the Legal Visits Areas in the respective locations.

10. The Special Rapporteur would like to thank the Government of the United Kingdom of Great Britain and Northern Ireland for the invitation and for the assistance provided during the mission. The Special Rapporteur is particularly grateful for the candid and comprehensive manner in which all Government officials with whom he met answered his questions. The Special Rapporteur would also like to thank all non-governmental organizations and other groups that provided him with information. Particular thanks are extended to British Irish Rights Watch and the Committee on the Administration of Justice.

11. The United Kingdom of Great Britain and Northern Ireland has signed and ratified most international human rights treaties. Those of most relevance to the Special Rapporteur include: the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Rights of the Child; the Convention on the Elimination of All Forms of Discrimination Against Women; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

I. GENERAL BACKGROUND

12. The "Troubles" that have afflicted Northern Ireland for the past three decades have placed a tremendous strain on the administration of justice. According to the latest statistics available, between 1969, when the British deployed troops to Northern Ireland in August, and 1994, there were over 3,100 deaths connected to the security situation which peaked in 1972 at 470; in 1994 there were 60 deaths. 2/

13. In an effort to combat the terrorism in Northern Ireland, the Government has enacted emergency legislation that gives the RUC extraordinary police powers to stop, question, search, arrest, detain, and interrogate persons merely suspected of terrorist activity. In fact, emergency legislation has been in force in Northern Ireland since the partition of Ireland in 1922. The primary emergency laws currently in force in Northern Ireland are the Northern Ireland (Emergency Provisions) Act 1996 (EPA) 3/ and its counterpart, the Prevention of Terrorism (Temporary Provisions) Act 1989 (PTA). The EPA was renewed in January 1996 for two years commencing in August 1996. The PTA, first passed in 1974, applied across the United Kingdom, is renewable annually, and was extended for another year in March 1997.

14. On 31 August 1994, the Irish Republican Army (IRA) announced a unilateral ceasefire. On 13 October 1994, the Combined Loyalist Paramilitary Command (CLMC), the coordinating body representing loyalist paramilitary groups, also called for a cessation of "all operational activities". Regrettably, on 9 February 1996, the IRA broke its ceasefire with the terrorist attack at Canary Wharf in London, killing two men and injuring more than 100 people. Since that time there have been a series of terrorist incidents by both the Republican and Loyalist paramilitary organizations. As a result of this continued violence, the Government has taken the position that the emergency regime in place in Northern Ireland is still necessary.

II. INTIMIDATION AND HARASSMENT OF LAWYERS

15. Since the inception of his mandate in 1994, the Special Rapporteur has received numerous allegations concerning the pattern of abusive remarks made against defence solicitors in Northern Ireland, particularly against those who represent individuals accused of terrorist related offences. These allegations were already the subject of a report to the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1992. 4/ They are based primarily upon instructions taken from clients by their solicitors, which reveal widespread reports of abuse of solicitors uttered by plain-clothes RUC officers during interrogations at the holding centres used to detain suspects held under emergency laws. The abuse against lawyers takes various forms ranging from mild forms of harassment (e.g., solicitor kept waiting to see client) to interference in the solicitor/client relationship (e.g., telling the detainee that the solicitor is not interested in him or her, that the solicitor's advice should be ignored, that the solicitor is representing the paramilitaries and not the client, etc.) to physical abuse and/or death threats (e.g., references to Patrick Finucane, whose murder is described below in paragraphs 60-74).

16. An example of this type of harassment and intimidation of solicitors is seen in a case the Special Rapporteur transmitted to the Government in a letter dated 1 August 1997. According to the source, it was alleged that one solicitor had been the victim of numerous death threats owing to the representation of a client, who had been charged with the murder of two RUC officers. Further, in relation to the representation of a residents group who oppose marching by the Orange Order through their nationalist housing estate, it was alleged that on 6 July 1997 the solicitor was verbally and physically abused while attempting to communicate with an RUC officer concerning the RUC efforts to seal off the area. The source further alleged that an RUC officer spat on the face of the solicitor who was accused of being a "Fenian" sympathizer. The solicitor was also allegedly struck on the back of the head with a police riot shield while intervening on behalf of a boy who was allegedly being ill-treated by an RUC officer.

17. In a response dated 6 October 1997, the Government informed the Special Rapporteur, *inter alia*, of the following:

> I can confirm that the Royal Ulster Constabulary has received four complaints from the solicitor and the client. The investigation of these is being supervised by the Independent Commission for Police Complaints. However, to date, the solicitor has not made himself available for interview to discuss the complaints. Police conduct is guided by the RUC's Professional Policing Ethics and Disciplinary Regulations: members who engage in any activity which contravenes either face the full rigours of the disciplinary regulations ...

18. While in Northern Ireland the Special Rapporteur was provided with another example of physical abuse concerning a solicitor. On 18 December 1996, the solicitor was attending the Grosvenor Road RUC Station in Belfast on behalf of a client. The RUC requested permission to take a mouth swab from the client for the purposes of DNA testing. The solicitor advised the client that he could decline to give a sample, but that if he did so the RUC were entitled to use reasonable force to do so. He did so decline, and the solicitor then advised him not to resist if the RUC insisted on taking a sample. However, he declined to take that advice and proceeded to resist, whereupon the police officer concerned summoned assistance from his colleagues. A number of officers entered the Charge Room, including the Custody Sergeant, Sergeant Reid, who is responsible for the welfare of detainees. He ordered the solicitor to leave the room. The solicitor questioned his authority to require him to leave and his reasons for doing so. He replied that it was for the safety of the solicitor. The latter advised him that he was prepared to take responsibility for his own safety, whereupon Sergeant Reid grabbed him by the arm and forcibly ejected him from the room. The solicitor has commenced legal proceedings against the officer concerned and the Chief Constable of the RUC for assault, battery and trespass to person and is seeking exemplary damages.

19. Another serious incident related to the Special Rapporteur concerns a solicitor from Belfast. According to his client, the solicitor was described as a "provie bastard" by RUC officers interrogating him on 14 October 1997 at the Gough Barracks in Armagh. What makes this case unique and disturbing to

the Special Rapporteur is that the Deputy Independent Commissioner for the Holding Centres, Mr. John Norris, was present during the interrogation in which the alleged derogatory comments were made. Mr. Norris has stated that he was not aware of any comment of a controversial nature or conduct that amounted to any abuse.

20. The Special Rapporteur wishes to emphasize that he spoke to a large number of solicitors and barristers who have worked in terrorist related cases representing both Loyalist paramilitaries and Republican paramilitaries. All were able to provide testimony that corroborates the reports that the Special Rapporteur has been receiving for the past four years concerning the harassment and intimidation of defence solicitors. Many referred to the harassment and intimidation as an occupational hazard that they have come to expect and accept, noting that in the absence of audio-recording there is only hearsay evidence to prove the allegations, that is, the word of the client against that of the RUC officer. Therefore, most find it futile to file a complaint, particularly in lieu of the fact that any investigation will be carried out by the RUC itself and that they had no confidence in such investigation.

21. The RUC categorically denies the allegations. In his meeting with the Special Rapporteur, the Chief Constable noted that there is a lack of evidence to substantiate the allegations, and further, there were hardly any complaints made by lawyers. He also pointed out that, in his view, it is significant that the solicitors have not sought judicial review of detentions on grounds of harassment and intimidation. He emphasized that the greatest degree of respect is shown to lawyers and questioned what possible benefit could there be for a police officer to make a disparaging comment or a threat. He also mentioned that numerous safeguards have been put in place to prevent such abuse, including the use of closed circuit televisions which must be monitored during the entire interrogation by a uniformed officer, the presence of a doctor who is available upon the request of the detainee and the appointment of the Independent Commissioner. The Chief Constable alluded to an agenda in which the paramilitary organizations ensured that detainees remain silent and alleged that solicitors may be involved in conveying this message to the detainees. Further, he stated that there is in fact a political divide in Northern Ireland and part of the political agenda is to portray the RUC as part of the unionist tradition. These allegations concerning police intimidation and harassment of solicitors is part and parcel of this political agenda. The Assistant Chief Constable also admitted that during the course of an interrogation an officer may express the view that the solicitor is providing bad advice to the client and not acting in his interests, for instance, by advising the client to remain silent.

22. The Special Rapporteur views with concern allegations of solicitors acting on behalf of paramilitaries. If true, they would constitute an egregious violation of a solicitor's professional responsibilities and, in the view of the Special Rapporteur, could be grounds for disciplinary proceedings. Further, if there were evidence that solicitors were involved in any complicity with a crime, criminal charges would undoubtedly have been brought against the solicitor. However, the Special Rapporteur wishes to emphasize that he was provided with no evidence to support the allegations. In this regard, to the knowledge of the Special Rapporteur, no solicitor has been

disciplined for engaging in such unethical activities or has had criminal charges brought against him. To a specific question from the Special Rapporteur, the Chief Constable said that the RUC did not lodge any complaint with the Law Society. If the RUC does have evidence to prove the allegations, the Special Rapporteur would encourage the RUC to submit the evidence to the disciplinary board of the Law Society so that the appropriate disciplinary action can be taken against the solicitor in question. With respect to failure on the part of the solicitors to apply for judicial review, the Special Rapporteur is of the view that harassment and intimidation may not be sufficient grounds for judicial review of the legality of the detentions. It is here pertinent to note that in its 18th Annual Report (1992-1993) to the Secretary of State, the Standing Advisory Commission on Human Rights (SACHR) stated, inter alia:

> "68. During the year the Commission received communications from some non-governmental organizations containing allegations that some lawyers who represent terrorist suspects in Northern Ireland are subject to intimidation by the police, through the process of interviews with their clients. The Commission is aware that there are difficulties in relation to whether allegations can be substantiated and takes the view that any cases supported by substantive information ought to be referred to the Independent Commission for Police Complaints. However, the Commission also recognizes that this matter raises significant questions about the nature of confidentiality and takes note of observations by the United Kingdom representative on the United Nations Commission to the effect that such concerns were justified. The Commission understands that this is a difficult and delicate issue and urges Government to take all reasonable steps to eliminate the circumstances which give rise to such allegations."

23. Principle 16 of the United Nations Basic Principles on the Role of Lawyers provides:

> "Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics."

24. Further, Principle 18 of the United Nations Basic Principles on the Role of Lawyers provides that "[l]awyers shall not be identified with their clients or their clients' causes as a result of discharging their functions".

25. The Special Rapporteur is concerned that the RUC has in fact identified lawyers who represent those accused of terrorist related offences with their clients or their clients' causes and further, that they have interfered in the attorney/client relationship by questioning during the course of interrogations the integrity and professionalism of solicitors. This is based not only upon the comments made by the Chief Constable and Assistant Chief Constable in his meeting with the Special Rapporteur, but also upon

documentary information presented to the Special Rapporteur. The Special Rapporteur was provided a copy of the transcript of a statement of witness to be tendered in evidence at preliminary inquiry in the case of R. v. Canning. In this transcript, in response to an unsatisfactory answer given by the accused, the interrogating officer is quoted as follows: "It's because it was a lie and your solicitor is getting you into more trouble. Can you not see that Paddy?" The transcript contains other innuendo suggesting that the solicitor is not acting in the interests of the client. In the case of Patrick Finucane, a solicitor murdered by a loyalist paramilitary organization in 1989 (see paragraphs 60-74 below), there was significant evidence to demonstrate that the RUC equated Patrick Finucane with the causes of his clients. However, the Special Rapporteur does wish to emphasize that following the murder of Patrick Finucane the RUC unequivocally stated that Patrick Finucane was not a member of the IRA or any other Catholic paramilitary organization. Nevertheless, the fact that many within the RUC did equate him with the causes of the IRA is reflected in the book written by John Stalker concerning his experience of trying to investigate allegations of a shoot-to-kill policy in Northern Ireland. In his book, Stalker describes a conversation between himself and an RUC sergeant concerning a lawyer who could only have been Patrick Finucane based upon the identification of the client and case:

> "The solicitor is an IRA man - any man who represents IRA is worse than an IRA man. His brother is an IRA man also and I have to say that I believe a senior policeman of your rank should not be seen speaking to the likes of either them. My colleagues have asked me to tell you that you have embarrassed all of us in doing that. I will be reporting this conversation and what you have done to my superiors." 5/

26. The Special Rapporteur is also concerned by the fact that the solicitors themselves rarely file complaints concerning this alleged harassment and intimidation. Several reasons were given as way of explanation. First, the solicitors clearly see this as a normal reaction to a difficult situation and is simply an occupational hazard. Second, the allegations are based on hearsay evidence that is impossible to prove, and thus, it would be the word of the client against that of the RUC officer. Third, any investigation of the complaint would require further questioning of the client by the police, which is understandably not desired by the client. Fourth, the investigation is carried out by the RUC, in whom the solicitors have no confidence. 6/ Fifth, the solicitors have no confidence in their own Law Society and its ability or willingness to take up the issue. The Law Society's position was attributed to a view that criminal solicitors are second class solicitors and that it should remain neutral in political cases to avoid a divide within its own membership.

27. The Special Rapporteur considers that despite their loss of confidence in the RUC's investigative measures, it would have been prudent for the solicitors concerned to have documented and submitted their complaints to the RUC, if for not anything else, at least for record purposes. Their failure contributed to the situation.

28. The Government has established an Independent Commission for Police Complaints (ICPC). 7/ However the ICPC has come under severe criticism owing to its limited powers. It cannot initiate investigations, but only supervise those referred to it by the Secretary of State, the Police Authority, or the Chief Constable. Even then its supervisory authority is limited insofar as a member of the Commission may only make suggestions to the assigned RUC officer about how an investigation should proceed, but cannot take direct action. If the member considers the investigation to be inadequate, the ICPC can only withhold a statement of satisfaction. Of the 16,375 complaints generally received by the ICPC through 1994, not one has resulted in any disciplinary sanction against any RUC officer. The 1996 report of the ICPC indicates that during 1996 the Chief Constable notified the Commission of 2,540 new cases of complaint. 8/ In only 10 cases, involving 39 charges and 10 officers, were disciplinary charges made; in only 1 case was an RUC officer found guilty of abuse of authority. 9/

29. As a result of the criticisms of the manner in which police complaints were handled, the Government authorized a review of the complaints system in Northern Ireland by Dr. Maurice Hayes. Based upon his review, Dr. Hayes main recommendation is that "there should be a Police Ombudsman, responsible to Parliament with the duty to investigate complaints and to report his/her findings". He also recommended that the post should be filled by a judge or a person of the quality and experience of a senior judicial figure. Further, the Ombudsman would recruit a staff which would include investigators, lawyers and people with police experience and others. She/he would investigate complaints against police even where the action complained about amount to criminal behaviour. Also, all complaints about the police and not just those on conduct, should be made through the ombudsman in the first place. 10/

30. During the course of the mission, the Special Rapporteur was informed that the recommendation of Dr. Hayes to establish a Police Ombudsman for Northern Ireland has been accepted by the Government. The Special Rapporteur has subsequently received a copy of the draft Police (Northern Ireland) Bill to be submitted to Parliament which provides for a Police Ombudsman to replace the Independent Commission for Police Complaints. Article 54 provides for formal investigation which must be carried out by the Ombudsman in serious cases. Section 56 covers the cases where a complaint or other matter is to be formally investigated by the Ombudsman. It provides for him to appoint an officer of the Ombudsman, who will have the powers and privileges of a constable. The Special Rapporteur welcomes this initiative by the Government as a positive step to improve public confidence in the complaint procedure system. The Special Rapporteur, however, does consider it imperative that the Government provide the Police Ombudsman with sufficient financial and human resources that will enable him to carry out this important mandate in an effective manner.

31. During the course of his mission, the Special Rapporteur was provided documents in those rare cases in which a solicitor has filed a complaint, either to the relevant Government authorities or to the Law Society. In all cases, the solicitor received no response or an inadequate response. The Special Rapporteur is also concerned that the reports by non-governmental organizations such as the Lawyers Committee for Human Rights and British-Irish Rights Watch detailing this pattern of harassment and intimidation seem to

have been dismissed by the RUC as baseless. In the view of the Special Rapporteur, these reports should serve as a basis for a dialogue between the RUC and the Law Society to improve the conditions under which defence solicitors must work within the Holding Centres.

Legal Profession

32. The Legal Profession in Northern Ireland, as in England and Wales, is divided into barristers and solicitors. The Bar Council is the professional body of the barristers. The Law Society is that of the solicitors. There are today in Northern Ireland about 1,700 solicitors, of whom 800 are women.

33. There was only a small number of lawyers who have been representing suspects or accused persons in politically sensitive cases. About 20 to 30 were actively involved and were largely solicitors. The very small number of barristers involved had no direct dealings with detainees or the RUC, hence they were not subject to this form of harassment.

34. In his meeting with the Bar Council, the Chairman indicated that as the issue was a matter concerning solicitors it was not so much for the Bar Council to address.

35. In his discussions with the Law Society, the President admitted that the Society had not taken a more forceful position to protect solicitors who were subjected to harassment and intimidation while representing clients in Holding Centres. However, it was emphasized that very few solicitors lodged complaints with the Law Society. One participant in the meeting explained that he personally had not sought the assistance of the Law Society because he felt that the Society would have no greater success than the individual solicitors in bringing complaints against the RUC. He did, however, note that he had in fact raised the issue when he had first become a member of the Law Society, but he had never received a response from the President. Another participant, who also represents those accused of terrorist related crimes, seconded this view, stating that he had "no confidence that any complaint would see the light of day". Both of these participants expressed the view that there is a lack of will on the part of the RUC to deal with the problem and that the only way to deal with it is to have video and audio recording of the interrogations. The President of the Law Society admitted to the Special Rapporteur that the Society could have done more for their solicitors.

36. The Special Rapporteur expresses his concern over the manner in which the professional bodies of lawyers in Northern Ireland, particularly the Law Society, addressed this issue. Harassment and intimidation of defence lawyers go to the core of the concept of independence of the legal profession and the administration of justice. The professional associations of the legal professions in such cases are duty bound to rush in aid of their members in such situations. What greater objective or interest can the organized legal profession have than the protection of the independence of the profession and of its individual members. Here the Special Rapporteur refers to Principle 25 of the United Nations Basic Principles on the Role of Lawyers, which provides "Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that

lawyers are able, **without improper interference**, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics." (emphasis added)

37. The Special Rapporteur has learned since the completion of his mission that the Law Society has published an advertisement in the Journal of the Law Society of Northern Ireland "The Writ", Issue No. 86, 1997, confirming the Society's concern "to ensure that solicitors are not subjected to any treatment in the course of their professional duties which would impugn or threaten their independence, professionalism and integrity". The advertisement also indicates that the Council has accepted recommendations from the Criminal Law and Human Rights Committees that a more formal system should be established to enable solicitors to report and register their concerns and calls upon solicitors with any complaints about the RUC, Prison Service or any agency within either the criminal or civil justice system to write with details to the President of the Society. The Special Rapporteur welcomes this initiative by the Law Society.

38. The Special Rapporteur is satisfied that there have been harassment and intimidation of defence lawyers by RUC officers as described. He is also satisfied that these harassments and intimidation were consistent and systematic. Though there were generally no specific substantiated complaints lodged with the RUC by the solicitors concerned, yet given the various reports from concerned non-governmental organizations, the annual report of the SACHR and the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, the RUC should have taken note of these complaints and taken steps to investigate them and end the situation. Failure to address these complaints and other general complaints over the years on the grounds that there were no substantiated complaints lodged with the RUC resulted in the RUC losing credibility in its internal complaints investigatory mechanism. This further resulted in a general loss of confidence, leading to the proposal for an independent ombudsman to investigate these complaints.

III. ACCESS TO COUNSEL

A. Deferrals of Access

39. Under Section 14 of the Prevention of Terrorism (Temporary Provisions) Act of 1989 (PTA), a person who has been arrested may be detained for up to 48 hours. This initial detention period can be extended for up to five days upon authorization by the Secretary of State. Thus, a detainee can be held without charge for up to seven days. 11/ Under Section 47 of the EPA, a detainee has the right to see a solicitor, but access to a solicitor can be deferred for up to 48 hours if a senior police officer reasonably believes that such access will interfere with the investigation, alert other suspects, or hinder the prevention of an act of terrorism. Further, the initial deferral of access can be renewed for further periods of up to 48 hours, although renewal of the deferral is rare.

40. Between 1987 and 1991, access to lawyers was deferred in 58 per cent of all PTA detentions on average. This rate of deferral fell to 26 per cent in

1992, 14 per cent in 1993, 16 per cent in 1994, 0.5 per cent in 1995, and 3 per cent in 1996. 12/ According to the Chief Constable of the RUC, in 1997, as of October, only 19 of 322 cases have been deferred.

41. Principle 5 of the Basic Principles on the Role of Lawyers provides that: "Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence." Principle 7 provides that "Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than 48 hours from the time of arrest or detention." Principle 8 provides that "All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and to consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials."

42. Read in conjunction, these principles indicate that, at a minimum, an individual has right of access to a lawyer within 48 hours of his or her arrest. Deferral of access beyond 48 hours is in violation of the Basic Principles. Further, the detainee must be informed immediately of the right of access to counsel upon his or her arrest or detention.

B. The Right to have a solicitor present during police interrogations

43. In practice solicitors have not been permitted by the RUC to be present at any stage during interrogations. In January 1996, *In the Matter of Applications by Michael Russell and Others for Judicial Review*, HUTE2184, the Belfast High Court rejected a petitioner's argument that he had a right to have counsel present during interrogations. However, while holding that no right has been extended by Parliament, the Court did express the opinion that "each application for access to a solicitor should be considered individually". 13/ Before the case was heard, the RUC changed its policy stating that every request for counsel to be present during interrogations would be considered on the particular merits of each case. Despite this new policy, however, the Special Rapporteur was informed by solicitors that in practice they continue to be denied the right to be present during the interrogation in the vast majority of cases falling under section 14 of Prevention of Terrorism Act 1989, although the RUC has occasionally exercised that discretion.

44. In the case of *In re Charles Begley's Application*, the High Court ruled that those detained under emergency laws have no right to have a solicitor present during interrogations and that no exceptional circumstances existed which warranted the exercise of discretion on the part of the RUC to allow the solicitor to be present. On appeal, the House of Lords held that a person arrested in Northern Ireland under Section 14 of the Prevention of Terrorism (Temporary Provisions) Act 1989 had no right to be accompanied and advised by his solicitor during interviews with the police. In its decision, the House of Lords pointed out that a suspect detained under the terrorism provisions was merely entitled to consult privately with a solicitor under section 47 of the Northern Ireland (Emergency Provisions) Act 1996. Further, the Code of

Practice issued under section 61 of the 1991 Act was to the same effect. Nowhere was there reference to any right for a person arrested under terrorism provisions to have a solicitor present during interview. The House of Lords concluded that the differential treatment of persons suspected of having committed offences under the terrorism provisions in Northern Ireland was plainly part of a deliberative legislative policy.

45. The United Nations Basic Principles on the Role of Lawyers do not explicitly address the issue as to whether a detainee has the right to have a lawyer present during a police interrogation. Principle 7 provides that "Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than 48 hours from the time of arrest or detention." Principle 8 provides that "All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials."

46. Similarly, the jurisprudence of the Human Rights Committee provides little guidance on this question. Article 14 (3) (b) provides that "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing." While the Human Rights Committee has found impermissible interference with the right to preparation of defence in a large number of cases, none address the issue as to whether a detainee has the right to have counsel present during police interrogations.

47. In the view of the Special Rapporteur, it is desirable to have the presence of an attorney during police interrogations as an important safeguard to protect the rights of the accused. The absence of legal counsel gives rise to the potential for abuse, particularly in a state of emergency where more serious criminal acts are involved. In the case at hand, the harsh conditions found in the holding centres of Northern Ireland and the pressure exerted to extract confessions further dictate that the presence of a solicitor is imperative.

C. Closed visits

48. In England and Wales, but not Northern Ireland, the Home Office has instituted a policy under which certain prisoners are designated as exceptional high risk category and are allowed legal visits in prisons only where the prisoner was separated from his lawyers by a transparent screen. In particular, the closed visits have been put in place in the Special Secure Units (SSUs) of Belmarsh, Full Sutton and Whitemoor prisons. They are applied to any prisoner who has been designated as being at "exceptional high risk" of escape. Elaborate security measures are in place, with lawyers being searched several times as they enter and exit SSUs and prisoners are strip-searched before and after visits, despite the fact that they had no contact with their lawyers or anyone apart from the prison staff.

49. As noted in paragraph above, the Special Rapporteur visited Belmarsh Prison in London where he was shown the closed visit area. All visitors to the SSU, including the prison staff, must pass through elaborate security measures upon entering the prison and upon entering the SSU. The closed visit area itself has four rooms for legal visits; each room is divided by a transparent screen to separate the solicitor and the client, and documents are exchanged between the solicitor and client by means of an x-ray screening machine to ascertain that there are no unauthorized materials passed between the two. A prison guard remains just outside the sound proof room to monitor the visit; the Special Rapporteur was assured that the prison guard cannot overhear the conversation, but can only visually monitor the visit.

50. Solicitors have complained that trial preparation is extremely difficult within the circumstances of a closed visit, which include problems over, for instance, examining documents jointly, and problems of confidentiality. Lawyers have also expressed the view that it is very difficult to establish the relationship of trust and rapport with their clients that is necessary for them to adequately prepare for the defence. Further, although the solicitors may request an open visit if exceptional circumstances so warrant, they believe that the decisions by the authorities concerning such requests are arbitrary and irrational. The Governor of the prison explained that often a few weeks prior to the trial discretion is exercised to open visits to enable the lawyer to prepare his or her client's case for trial.

51. In a recent Court of Appeal decision concerning the issue of closed visits, 14/ the Court held that whether to impose closed visits or not was a matter of prison security to be decided by the prison authorities, and dismissed the appeal. However, the Special Rapporteur has learned that the Government has recently announced the recategorization of IRA prisoners in British jails which has meant that they have been moved out of SSUs. Prison officials informed the Special Rapporteur that in fact, at the time of his visit, there are only six prisoners in England and Wales that were currently categorized as exceptional high risk, down from 23 in May 1997. The officials noted that there is a continuous review of categorization and they are constantly reviewing the policy in general to maintain the proper balance between the needs of the institution and the needs of individual prisoners. The Special Rapporteur was informed by the Chief Inspector of Prisons, Sir David Ramsbottom, at the Home Office in London that closed visits would soon be discontinued as he himself did not feel the need for their continuation.

52. Principle 8 of the Basic Principles on the Role of Lawyers provides that "All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials." The General Comment of the Human Rights Committee on Article 14 of the International Covenant on Civil and Political Rights provides, inter alia:

> "9. Subparagraph 3 (b) provides that the accused must have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. What is "adequate time"

depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel ... Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter." 15/

53. In the view of the Special Rapporteur, in the absence of evidence that solicitors are abusing their professional responsibilities, the closed visits within the SSUs constitute an undue interference with the lawyer/client relationship and create unnecessary impediments for adequate trial preparation. At a minimum, the burden should be upon the prison officials on a case-by-case basis to demonstrate that the closed visits are an exceptional measure necessary to maintain prison security. In the light of what the Chief Inspector of Prisons said to the Special Rapporteur, it is expected that closed visits will be discontinued.

D. Proposal for a Legal Advice Unit: Independent Commissioner for Holding Centres

54. The Independent Commissioner for Holding Centres (ICHC) was appointed in 1992. His role is described as "providing further public reassurance that terrorist suspects detained in any of the then holding centres (Castlereagh, Belfast; Strand Road, Londonderry; and Gough Barracks, Armagh) were fairly treated and that the statutory and administrative safeguards for their treatment were being properly observed and apply". The mandate of the Independent Commissioner does not include investigation of complaints against police. He may receive complaints, yet such complaints must be transmitted to the Chief Constable for investigation.

55. In 1994, the Independent Commissioner for the Holding Centres proposed the establishment of a legal advice unit at Holding Centres, which would modify the present legal aid system in Northern Ireland by granting legal aid only to those detainees arrested under the emergency legislation who choose a government-appointed solicitor from a unit of lawyers associated with the holding centres. The Law Society of Northern Ireland would manage and operate the legal advice unit and it would be funded by the Government. 16/ This proposal came under severe criticism on the grounds, inter alia, that it violated the principle that a defendant has the right to counsel of his or her choice. During his discussions with the Independent Commissioner, the Special Rapporteur learned that the Independent Commissioner has withdrawn this proposal.

IV. VIDEO AND AUDIO-RECORDING OF POLICE INTERVIEWS

56. The pervasive allegations of harassment and intimidation of lawyers and of the accused himself during police interrogations in the Holding Centres in Northern Ireland has led many commentators to call for the installation of video or audio/video recording of interrogations. Interrogations are currently relayed on a silent television monitor which is monitored by a police officer. However, there has been no instance in which a disciplinary or criminal charge has been brought against any police officer as a result of

this surveillance, despite many allegations of ill-treatment made by detainees and despite the numerous cases in which civil damages have been awarded to detainees as a result of ill-treatment in the Holding Centres. 17/

57. In his first annual report, the Independent Commissioner for the Holding Centres, Sir Louis Blom-Cooper, Q.C., called for the introduction of video- and audio-recording of police interviews. The detainee or his legal representative would be able to initiate the process of disclosure if the detainee wishes in any future trial to challenge the admissibility of a statement alleged to have been extracted from him improperly. 18/ In his second annual report, the Independent Commissioner reiterated his call to introduce audio- and video-recording of police interviews, noting the widespread support for such measures from, among others, the Northern Ireland judiciary and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. 19/

58. In 1995 the then Secretary of State for Northern Ireland, Sir Patrick Mayhew announced that he would introduce a scheme for "electronic recording" at the Holding Centres, which was incorporated into the new s.53 of the 1996 version of the EPA. In January 1997 a draft code of practice was issued on silent video-recording of police interviews at the Holding Centres. Solicitors and non-governmental organizations have expressed the view that the draft code is deficient in many respects, particularly since it leaves in the hands of the prosecution the question of whether a video or any part of it, should be disclosed to the defence.

59. On 16 October 1997 the Northern Ireland Office announced that silent video-recording is to be installed in Castlereagh Holding Centre and will be eventually installed at Gough Barracks and Strand Road. During the course of his visit to Castlereagh, the Special Rapporteur was shown the work in progress to install the necessary equipment. More importantly, the Special Rapporteur was informed by the authorities that it is the intention of the current Government to amend the legislation to include audio- as well as video-recording. The Special Rapporteur welcomes this initiative as an important step towards enhancing public confidence in the Government's commitment to ensure accountability. The Special Rapporteur also notes that it is in the interest of the RUC itself as a means to defend itself against what they allege to be false allegations.

V. MURDER OF PATRICK FINUCANE

60. On 12 February 1989, Patrick Finucane, a solicitor who was well-known for his defence of individuals detained under Northern Ireland's emergency legislation, was killed by two masked gunmen who entered his home and shot him 14 times in front of his wife and three children. His wife, Geraldine Finucane, was also injured when a bullet probably ricocheted and hit her in the ankle. The Ulster Freedom Fighters, a Protestant paramilitary organization, immediately claimed responsibility for the murder, but to date no one has ever been charged for the crime.

61. The murder of Patrick Finucane came less than four weeks after statements were made by Douglas Hogg, MP, then Parliamentary Under-Secretary of State for the Home Department, in a Committee stage debate on the

Prevention of Terrorism. In the debate, Mr. Hogg stated: "I have to state as a fact, but with regret, that there are in Northern Ireland a number of solicitors who are unduly sympathetic to the cause of the IRA." Mr. Hogg failed to provide any evidence to substantiate this serious allegation, merely stating, "... I state it on the basis of advice that I have received, guidance that I have been given by people who are dealing with these matters, and I shall not expand on it further."

62. Prior to his murder, Patrick Finucane also received a number of death threats from RUC officers, mainly delivered via his clients. One client, Brian Gillen, who received compensation for ill-treatment he suffered while in detention, has provided testimony that he was told by a RUC officer following the filing of a habeas corpus petition on his behalf by Finucane that "it would be better if he [Patrick Finucane] were dead than defending the likes of you," and that they threatened to give details concerning the solicitor and his client to loyalist paramilitaries. Following his defence of Gillen, other clients have testified that numerous death threats were made against Finucane by the RUC. He is also reported to have received threatening phone calls at his home. On 5 January 1989, five weeks before his death, one of Patrick Finucane's clients alleged that an RUC officer

> "... informed me that my solicitor was working for the IRA, and would meet his end also ... He asked me to give Mr. Finucane a message from him ... He told me to tell him he is a thug in a suit, a person trying to let on he is doing his job, and that he, like every other fenian [republican] bastard, would meet his end."

63. Since Patrick Finucane's murder, further information that seriously calls into question whether there was official collusion has come to light following the arrest and conviction of Brian Nelson for conspiracy to murder in January 1990. According to the evidence that was presented at his trial, Nelson, who served as a chief intelligence officer for the Ulster Defence Association (UDA), had been recruited by military intelligence to provide information on paramilitary activities, including planned assassinations, which the army would then pass on to the RUC. Nelson did in fact later participate in the planning of assassinations that were actually carried out, which were the basis for his conviction. A BBC *Panorama* documentary that was broadcast on 8 June 1992 revealed that Nelson had kept a prison diary in which he wrote that he had informed "his handlers" in the military that Patrick Finucane was being targeted by loyalist paramilitaries as early as December 1988. The diary also stated that Nelson had provided a photograph of Finucane to a paramilitary assassin a few days before the murder. Although certain questions have arisen as to the authenticity of the journal, the information contained in the diary was essentially corroborated by a witness at Nelson's trial. This witness, referred to only as "Colonel J" to protect his identity, was a senior ranking military intelligence officer. According to his testimony, Nelson had provided him with UDA materials on a weekly basis, which included security documents, photo montages and reports "from all sectors of security forces" which had been leaked to the UDA. More seriously, Colonel J testified that the RUC had been informed about the information passed on by Nelson to military intelligence, including the planned assassinations. In this regard, Colonel J noted that planned assassinations had been foiled, including an attempt on the life of Mr. Gerry Adams. The

RUC, however, has denied that any information obtained by Nelson concerning the planned assassination of Patrick Finucane had been passed on to the police. During the mission, the Special Rapporteur was told by Government sources that Brian Nelson's information saved about 70 lives.

64. Following the *Panorama* broadcast, the then RUC Chief Constable Hugh Annesley requested John Stevens, who had conducted an earlier inquiry into charges of collusion which led to the arrest and conviction of Brian Nelson, to investigate the allegations made in the *Panorama* programme. Stevens issued his final report on this second investigation to the Director of Public Prosecutions (DPP) in January 1995. Unfortunately, neither the report nor its conclusions have ever been made public and Mr. Stevens has declined to discuss its recommendations on the grounds, presumably, that he is prohibited from commenting by the Official Secrets Act. On 17 February 1995 the DPP issued a direction of "no prosecution" to the Chief Constable. This decision not to prosecute has come under severe criticism from non-governmental organizations, particularly in light of the fact that Stevens has publicly stated that he knew "absolutely" who killed Patrick Finucane. 20/

65. In a letter dated 1 September 1996, the Special Rapporteur on situations of extrajudicial summary or arbitrary executions transmitted a letter to the Government setting forth the following questions:

(a) Why did the DPP decide not to prosecute Brian Nelson?

(b) Have reports been produced as a result of the investigation carried out? Have these been made public?

(c) What further steps have been taken?

66. In a letter dated 31 October 1996, the Government provided the following response:

"Nelson Allegations

Following the television broadcast in June 1992 in which Brian Nelson alleged involvement in the murder of Mr. Finucane, Mr. Stevens (Deputy Chief Constable, Cambridgeshire Constabulary) was asked to investigate the allegations made which were not covered earlier in his report. Supplementary reports were forwarded to the Director of Public Prosecutions for Northern Ireland, in April 1994, October 1994 and January 1995. A considerable number of matters were subject of investigation in the supplementary reports including matters relating to the murder of Mr. Patrick Finucane. The Director concluded that there was insufficient evidence to warrant prosecution of any person and accordingly a direction of no prosecution was issued on 17 February 1995.

Availability of Reports

A summary of Mr. Stevens' initial report was published on 17 May 1990. The supplementary reports have not been made public.

Other Points

The RUC investigation of the murder of Mr. Finucane is still open and the RUC will look at any new evidence presented to them in relation to the case."

67. During the course of his mission to Northern Ireland, the Special Rapporteur met with Mrs. Finucane and other family members, Mr. Peter Madden and Mr. Kevin Winters of Madden & Finucane and other barristers and solicitors familiar with the case. He also discussed the murder of Patrick Finucane with the Chief Constable of the RUC, Mr. Ronnie Flanagan, and the Director of Public Prosecutions, Mr. Alasdair Fraser, Q.C.

68. In his discussion of the case with the Special Rapporteur, the Director of Public Prosecutions emphasized that the case was reviewed in a rigorous manner, but there was simply insufficient evidence to bring a prosecution. In this regard, he noted that there is a two-pronged test in England and Northern Ireland in determining prosecution: (1) Is there a reasonable prospect of obtaining a conviction?; (2) Does the public interest demand prosecution? In this case, he had concluded that the first test had not been met, noting that allegations merely constitute a line of investigation but may not constitute admissible evidence. He emphasized that the DPP is wholly independent of the Government and that it prosecutes cases across the divide, as well as against the RUC and the military. At the same time, he acknowledged that his role is necessarily limited owing to the fact that he does not have investigators. The investigation itself is done by the RUC, or in this case by the Stevens inquiry. In this case, he stated confidently that the Office had met its responsibilities. He did note, however, that each murder case remains open and that he would bring the case forward if there is further evidence.

69. The Special Rapporteur appreciates that there can be some cases where the person who committed the crime may be known, yet there may be insufficient admissible evidence to prove the case and secure a conviction.

70. Owing to the time constraints, the Special Rapporteur was unable to meet with Mr. John Stevens at the time of the mission, as suggested by the Chief Constable, who felt he was not in a position to comment upon the particulars of the case. However, in a letter to Mr. Stevens dated 27 November 1997, the Special Rapporteur requested a written response to the following questions:

(a) Did the military know that Patrick Finucane was the target of the UDA? If so, did the military notify the RUC?

(b) If the military did not notify the RUC, why not? In any event, why did the military not alert Patrick Finucane and provide adequate protection?

(c) If the military did notify the RUC, why did the RUC not alert Patrick Finucane and provide security?

(d) Prior to his murder, Patrick Finucane was subjected to threats and intimidation by RUC officers. Were these allegations investigated by the RUC?

71. In a letter dated 14 January 1998, Mr. Stevens acknowledged receipt of the Special Rapporteur's letter dated 27 November 1997. The response states:

> "As you will be aware the reports submitted by me are the property of the Secretary of State for Northern Ireland and the Chief Constable of the RUC. I am therefore not in a position to release these reports or indeed divulge any of the contents. The reports are highly classified and the authority of the above persons will be required before information is released."

Mr. Stevens concludes by stating that "[t]he contents of your letter will be discussed with the Chief Constable of the RUC.

72. Although some pointed out that this was only one of hundreds of unresolved murders, the murder of Patrick Finucane is of a different nature. As a high profile lawyer who had tremendous success representing his clients, both before domestic courts and the European Court of Human Rights, his murder had a chilling effect on the profession and further undermined public confidence in the judicial system. Solicitors informed the Special Rapporteur that the murder led them either to give up criminal practice entirely or to alter the manner in which they handled terrorist related cases. Thus, the defendant's right to counsel was compromised. It was also learnt that several lawyers armed themselves for self-defence and their houses were equipped with security devices.

73. Principle 17 of the United Nations Basic Principles on the Role of Lawyers provides, "Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities." If it is true that Brian Nelson informed military intelligence of the UDA's intent to murder Patrick Finucane, as Nelson claims in his prison diary and which seems to be corroborated by the testimony of Colonel J at Nelson's trial, then the Government has violated its duty to safeguard Patrick Finucane. Further, this omission would constitute a violation of article 6 of the International Covenant on Civil and Political Rights. The outstanding questions surrounding the murder of Patrick Finucane demonstrate the need for an independent judicial inquiry. So long as this murder is unresolved, many in the community will continue to lack confidence in the ability of the Government to dispense justice in a fair and equitable manner.

74. Though the United Nations Basic Principles on the Role of Lawyers were endorsed by the General Assembly in the aftermath of this murder, yet the Government's duty to provide adequate safeguards to protect the security of lawyers in such circumstances must necessarily be implied, particularly in a country which cradled and nurtured the concept of an independent system of justice.

VI. EMERGENCY LEGISLATION AND ORDINARY CRIMINAL LAW

75. Concerns have been expressed to the Special Rapporteur that certain provisions in the emergency legislation and in the ordinary criminal law impinge on the ability of the judiciary to function impartially and independently. These provisions include the abrogation of the right to silence, the lower threshhold for admissibility of confession evidence and the

absence of a jury. In this regard, the Special Rapporteur notes that Principle 6 of the Basic Principles on the Independence of the Judiciary provides that "The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected."

76. The Special Rapporteur wishes to emphasize that he has full confidence in the integrity of the judiciary in Northern Ireland and believes that they are in fact applying the law in an impartial manner. Nevertheless, the Special Rapporteur has repeatedly emphasized that the judiciary must not only be independent and impartial, it must be seen to be independent and impartial. The provisions in question have seriously eroded public confidence in the ability of the judiciary to render its decision in an independent and impartial manner, and therefore, these issues fall within the remit of the Special Rapporteur's mandate.

A. Right to remain silent

77. The Criminal Evidence (Northern Ireland) Order 1988 permits a judge to draw adverse inferences from a detainee's silence in three circumstances: (1) when the defendant bases his or her defence on a fact that he or she could reasonably have been expected to raise during police questioning, but did not; 21/ (2) when the accused fails to give the police an explanation for the presence of a nearby substance, object or mark that could reasonably be believed to have a connection to a crime; 22/ and, (3) when a defendant fails to account for his or her whereabouts at the time a crime was committed. 23/ The Order also allows a negative inference to be drawn if the defendant fails to answer questions at trial. 24/ Section 34 of the Criminal Justice and Public Order Act 1994 extends the same legislation to England and Wales, the relevant provisions of which came into force on 1 April 1995.

78. A joint study by the non-governmental organization, Committee for the Administration of Justice (CAJ) and Liberty claims that the extension of the provisions took place with no empirical assessment of whether the desired results (i.e., increased convictions) and the stated dangers had in fact resulted from the legislation in Northern Ireland. To the contrary, the study demonstrates that the statistical evidence indicates no change in conviction rates for serious crime resulting from the imposition of the order. The study further concludes that the caution given upon arrest is poorly understood by suspects; that vulnerable suspects are being pressured to speak; that innumerable professional conflicts arise for lawyers from the adverse inferences; that the shift in the burden of proof at trial is real and pronounced; that use of the inference at preliminary inquiry is pushing cases with insufficient prima facie evidence to trial; and that judges have displayed a lack of caution in their willingness to read negative inferences into a defendant's silence. 25/

79. International standards, as well as general principles of criminal law, provide that the burden of proving guilt rests with the prosecution. The right not to be compelled to incriminate oneself is outlined in article 14 (3) of the International Covenant on Civil and Political Rights. In its General Comment 13 on article 14, subparagraph 3 (g) on the Covenant, the Human Rights Committee states inter alia: "In order to compel the accused to confess or

testify against himself frequently methods which violate these provisions [article 7 and article 10] are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable." While the Human Rights Committee is referring to the use of torture or inhumane treatment in detention as means of compelling a confession, in the view of the Special Rapporteur any means used by the State to exert undue influence upon a detainee to compel a confession of guilt is unacceptable. In the case of Northern Ireland, the inferences that may be drawn under the 1988 Criminal Evidence Order indirectly exert pressure on the detainee to make statements that may incriminate him, and thus, is a violation of the principle of right to silence set forth in article 14 of the ICCPR.

80. Other international human rights bodies have issued similar findings. In *Murray v. United Kingdom*, the European Court of Human Rights held that the power to draw adverse inferences from silence, coupled with the deferral of access to counsel in Northern Ireland, constitutes a violation of the fair trial provisions of article 6 of the European Convention on Human Rights. 26/ Similarly, in their comments to the United Kingdom representative during the presentation of the periodic report, the Human Rights Committee members expressed their concern that the extension of the legislation to England and Wales diluted the presumption of innocence, violated the prohibition against testimonial compulsion and negated the right to a fair trial. 27/ In its comments on the periodic report the Committee found that the provisions of this legislation violate article 14 of the Covenant. 28/

B. Admissibility of confession evidence

81. In Northern Ireland confession evidence is admissible in cases scheduled under section 12 of the Northern Ireland (Emergency Provisions) Act (EPA) unless the accused was subjected "to torture, to inhuman or degrading treatment, or to any violence or threat of violence (whether or not amounting to torture), in order to induce [an accused] to make the statement". 29/ Further, in Northern Ireland the accused must present prima facie evidence of the torture, inhuman or degrading treatment or violence or threat to violence, while under the Police and Criminal Evidence (NI) Order (PACE) there is a lower threshhold for the admissibility of such evidence. In Northern Ireland, once the defendant makes this showing, the burden shifts to the prosecution to show that the confession was not coerced in the specified manner.

82. Non-governmental organizations have argued that this standard means that physical deprivation or psychological pressure short of outright violence is permissible. This standard is particularly troubling in light of the fact that the Human Rights Committee has recommended the closing of Castlereagh Holding Centre as a "matter of urgency" owing to "unacceptable" conditions of detention, including tiny cells with no opening to natural light, the absence of exercise areas, lengthy and frequent interrogations, and persistent allegations of intimidation and harassment during interrogations. 30/ The provisions under Section 12 of the EPA also means that nothing prevents the introduction of involuntary confessions. In the view of the Special Rapporteur, Section 12 may be in contravention of the principle that one should not be compelled to incriminate oneself and shifts the burden to prove innocence from the prosecution to the defendant.

C. Diplock Courts

83. In Northern Ireland the Government has established the so-called Diplock courts in which certain scheduled offences are tried without a jury by a single judge. 31/ The absence of a jury and the unique role that judges play in these cases (e.g., the inferences that may be drawn if the accused remains silent) has altered the manner in which judges are viewed. This has led, as reported to the Special Rapporteur, a large segment of the population of Northern Ireland to view the administration of justice in such cases as not being independent and impartial. 32/ In the view of the Special Rapporteur, restoration of the jury system, which has been a culture within the criminal justice system in England, would help restore public confidence in the administration of justice.

VII. OTHER ISSUES

A. "Bugging"

84. Part III of the Police Act, allowing for actions "with respect to property and wireless telegraphy", allows an operation to be authorized if the authorizing officer believes (1) that the action is likely to be "of substantial value" in the prevention or detection of serious crime, and (2) this cannot reasonably be achieved by other means. Where an action is likely to result in acquiring knowledge by any person of matters subject to legal privilege, prior approval by one of the Commissioners is needed. The Act defines legally privileged matters as communications between a professional legal adviser and his client, or any person representing his or her client, which are made (1) in connection with the giving of legal advice to the client; (2) made in contemplation of legal proceedings and the purposes of such proceedings; and items with or enclosed to such communications. Excluded from legal privilege are matters which are privileged as to their content, but which are in the possession of someone who should not have them; and matters held or communications made with the purpose of furthering a criminal purpose. The decision whether or not a communication is legally privileged is up to the authorizing officer, but will be reviewed by the Commissioner ex officio upon receipt of the authorization notification required under Section 96.

85. Non-governmental organizations with whom the Special Rapporteur met during his mission criticized the provisions of Part III of the Police Act empowering law enforcement agencies to undertake "bugging" operations on the following grounds:

(1) The Police Act is narrowly drafted and deals only with use of listening devices which interfere with "wireless telegraphy" or use of which necessitates trespass. Thus, devices such as sensitive microphones, or the bugging of communications in a police or prison cell is wholly outside of any statutory control. There are no safeguards against misuse of "bugging" devices in such situations;

(2) The Act does not define the additional criteria necessary for authorization of intrusive operations in which privileged communications are likely to be intercepted, and conditions that may be attached to such operations;

(3) The Code of Practice should explain the concept of legal privilege in greater detail. For instance, it fails to clarify a borderline case between a lawyer acting legitimately for a client suspected of a criminal offence, and the lawyer furthering a criminal purpose;

(4) The Code of Practice fails to clarify the term "legal adviser";

(5) The Code of Practice does not explicitly provide for the destruction of legally privileged material.

86. The Government's contention has been that the lawyers could not be exempted from the surveillance of premises envisaged under the act. Further, the Government considers that involving a judge at that stage may be viewed as the judiciary involving itself in the investigatory process

87. While appreciating the Government's contention, yet given the importance of the concept of legal privilege, which is crucial to the independence of lawyers, the Special Rapporteur views the provisions of Part III of the Police Act with grave concern. The Special Rapporteur draws the Government's attention to the strict statutory regime in New Zealand pertaining to applications for the use of listening devices to intercept private communications. In New Zealand, such applications have to be made to a High Court Judge, who may issue a warrant only if she/he is satisfied that: (a) to issue a warrant would be in the best interests of the administration of justice; (b) one of the specified offences has been or is about to be committed; (c) there are reasonable grounds to believe that evidence relevant to the investigation of this offence will be obtained through the use of a listening device; (d) other methods have been tried and failed, or the use of other methods would be unlikely to lead to the successful conclusion of the investigation or would be too dangerous to adopt; (e) *the communications to be intercepted are not likely to be subject to legal or other privilege* (emphasis added). The Special Rapporteur is particularly concerned that under the Police Act for England and Wales the decision to authorize bugging of legal premises is made by a police officer who most likely will not have the requisite training to appreciate the concept of legal privilege. In the view of the Special Rapporteur, such a decision should require prior authorization from a judicial officer.

B. Incorporation of the European Convention on Human Rights

88. During the course of the Special Rapporteur's mission to the United Kingdom and Northern Ireland, the Government introduced to Parliament the Human Rights Bill, which will incorporate the European Convention of Human Rights into United Kingdom law. 33/ The Special Rapporteur welcomes the introduction of this Bill to Parliament.

VIII. CONCLUSIONS AND RECOMMENDATIONS

89. The Special Rapporteur is quite cognizant of the fact that the ongoing peace talks in Northern Ireland are at a crucial stage, particularly in the light of the upsurge in violence over the course of the past months. It is within this context that the Special Rapporteur makes these conclusions and recommendations with the conviction that respect for the rule of law and human rights with greater accountability from all public institutions will enhance the prospects for a peaceful resolution of the conflict. In this regard, the Special Rapporteur wishes to express his gratitude to the Government of the United Kingdom and Northern Ireland for inviting him to undertake this mission, which demonstrates the Government's openness to outside scrutiny and its willingness to listen to the concerns of the international community.

Concerning the harassment and intimidation of solicitors

90. The Special Rapporteur concludes that the RUC has engaged in activities which constitute intimidation, hindrance, harassment or improper interference. The Special Rapporteur is particularly concerned by the fact that the RUC has identified solicitors with their clients or their clients' causes as a result of discharging their functions.

91. Accordingly, the Special Rapporteur recommends that:

(a) The authorities, preferably the proposed Police Ombudsman, conduct an independent and impartial investigation of all threats to legal counsel in Northern Ireland;

(b) Where there is a threat to the physical integrity of a solicitor or barrister, irrespective from whom the threat emanates, the Government should provide the necessary protection and should vigorously investigate the threats and bring to justice the guilty party;

(c) Both the Bar Council and the Law Society should be more vocal in their defense of solicitors who have been subjected to such harassment and intimidation and should enter into a dialogue with the RUC on how best to address the problem. In this regard, the Special Rapporteur welcomes the steps taken by the Law Society to establish a complaints procedure;

(d) Lawyers themselves must lodge formal complaints with the authorities including these non-professional bodies;

(e) As a matter of urgency, the RUC should organize, in conjunction with the Law Society and the Bar Council, training seminars for police officers to sensitize them on the important role that defence lawyers play in the administration of justice.

Concerning access to lawyers

92. The Special Rapporteur considers a defendant's right to counsel to be of paramount importance to guarantee his or her right to a fair trial and to protect against potential abuse.

93. Accordingly, the Special Rapporteur recommends that:

(a) The right to immediate access of counsel should be respected, and therefore, Section 14 of the PTA should be amended to prohibit deferral of access;

(b) The right to have a solicitor present during police interrogations should be respected;

(c) The practice of closed visits in England and Wales should be discontinued.

Concerning video and audio-recording of police interviews

94. As a matter of urgency, the Government should install video and audio-recording equipment in all holding centres in Northern Ireland. Further, the tapes of such recordings should be available to counsel upon request. While welcoming the proposed legislation in this regard, the Special Rapporteur urges speedy implementation of the legislation once passed by Parliament.

Concerning the murder of Patrick Finucane

95. The Government should appoint an independent judicial inquiry to investigate the outstanding questions that remain in the case of Patrick Finucane. The Special Rapporteur urges the Government to invoke the provisions of the Commissions of Inquiry Act as it has recently done in the case of the Bloody Sunday incident.

Concerning the emergency legislation

(a) The right to silence should be immediately reinstated. Neither judges nor juries should be permitted to draw adverse inferences at trial from a defendant's failure to respond to police questioning. Accordingly, the Criminal Evidence (Northern Ireland) Order 1988 should be rescinded;

(b) The permissive EPA standard for admitting at trial confession evidence procured by psychological pressure, deprivation, or other non-violent forms of coercion should be abolished. The standard for admitting confession evidence should conform to the Police and Criminal Evidence (Northern Ireland) Order of 1989 (PACE). In general, the implementation of the ordinary law should be given priority;

(c) The right to trial by jury should be reinstated, with safeguards put into place to protect the integrity of jurors.

Concerning the issue of "bugging"

96. The Special Rapporteur is concerned that Part III of the Police Act, which allows for actions "with respect to property and wireless telegraphy" is too vague and should be amended to ensure that privileged communications between an attorney and client are scrupulously respected.

Concerning the Police Ombudsman

97. While welcoming the Police (Northern Ireland) Bill submitted to Parliament, calling for the creation of a Police Ombudsman, the Special Rapporteur calls upon the Government to provide the institution with the necessary human and financial resources to meaningfully carry out its mandate, which will go a long way towards restoring public confidence in the police complaints procedure.

Concerning the judiciary

98. The Government should implement training programmes on international human rights standards and on the jurisprudence of international human rights bodies such as the Human Rights Committee and the European Court of Human Rights. The latter is particularly timely in light of the Government's Human Rights Bill calling for the incorporation into British law of the European Convention on Human Rights.

Notes

1/ The Standing Advisory Commission on Human Rights (SACHR) is the government-appointed board which advises the Government on human rights concerns.

2/ Digest of Information on the Northern Ireland Criminal Justice System, Northern Ireland Office, Statistics and Research Branch, July 1996, p. 6.

3/ The Emergency Provisions Act (EPA) was first enacted in 1973, replacing the Civil Authorities (Special Powers) Act (Northern Ireland) 1922. There have been a series of amended versions since 1973.

4/ The Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers: Report on the Independence of the judiciary and protection of practising lawyers, prepared by Mr. Louis Joinet pursuant to resolution 1991/35 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-fourth session, E/CN.4/Sub.2/1992/25, 5 August 1992.

5/ Stalker, Stalker, J. (Penguin, 1988), p. 49.

6/ This skepticism appears to be borne out by the statistics. The statistics for 1994 indicate that the RUC dealt with 554 complaints of harassment or oppressive conduct and substantiated only four. See Royal Ulster Constabulary, Chief Constable's Annual Report 1994, at 91 (1995).

7/ The Independant Commission for Police Complaints, established in 1988, is an eight-man member body appointed by the Secretary of State for Northern Ireland to provide civilian oversight of complaints investigation.

8/ Independent Commission for Police Complaints Northern Ireland, 1996 Annual Report (June 1997), p. 39.

9/ *Ibid*, p. 43.

10/ A Police Ombudsman for Northern Ireland: A Review of the police complaints system in Northern Ireland, by Dr. Maurice Hayes (January 1997).

11/ In Brogan, et al. v. United Kingdom, (Series A, No. 145-B, Strasbourg, 29 November 1988), the European Court of Human Rights held that a detention under the PTA for four days and six hours violated the fair trial provisions of Article 5(3) of the European Convention on Human Rights. In response, the United Kingdom entered a derogation under Article 4 of the International Covenant on Civil and Political Rights and Article 15 of the ECHR in order to retain the power to detain for up to seven days without charge.

12/ Northern Ireland (Emergency Provisions) Acts: Statistics, Northern Ireland Office, Table 12.

13/ See *In the Matter of Applications by Michael Russell and Others for Judicial Review*, KERE2222, p. 5.

14/ R v. Secetary of State for the Home Department, ex parte O'Dhuibhir and O'Brien, 1997, unreported, Court of Appeal.

15/ General Comment 13/21 of 12 April 1984 [Procedural Guarantees in Civil and Criminal Trials].

16/ Independent Commissioner for Holding Centres, *Delayed Choice or Instant Access? Legal Advice for Detainees in Holding Centres* (Belfast: ICHC, November 1994).

17/ The annual reports of the Independent Commission for Police Complaints from 1988 to 1995 indicate that despite the fact that approximately 400 complaints have been filed against the police annually arising out of detention under the emergency laws, not a single complaint has been upheld in the past eight years.

18/ First Annual (1993) Report of the Independent Commissioner for Holding Centres, submitted to the Secretary of State for Northern Ireland, 31 January 1994, pp. 110-111.

19/ Second Annual (1994) Report of the Independent Commissioner for the Holding Centres, submitted to the Secretary of State for Northern Ireland, 31 March 1995.

20/ Stevens told the Lawyers Committee for Human Rights that he knew "absolutely" who killed Patrick Finucane, "but was not at liberty to disclose their identity publicly." Lawyers Committee for Human Rights, At the Crossroads: Human Rights and the Northern Ireland Peace Process, p. 108.

21/ Criminal Evidence (Northern Ireland) Order 1988, article 3.

22/ *Id.* article 5.

23/ *Id.* article 6.

24/ *Id.* article 4.

25/ Justice and the Committee on the Administration of Justice, *Right of Silence Debate: The Northern Ireland Experience* (1994).

26/ *Murray v. United Kingdom*, Case 41/1994/488/570 (1996.)

27/ HR/CT/424, 21 July 1995.

28/ CCPR/C/79/Add.55, para. 17, 27 July 1995.

29/ Northern Ireland (Emergency Provisions) Act 1996, section 12 (2)(b).

30/ *Comments of the Human Rights Committee in Consideration of the Fourth Periodic Report of the United Kingdom and Northern Ireland*, para. 22. The United Nations Committee against Torture has also expressed concern that interrogations at Castlereagh may breach the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See Consideration of Second Periodic Report of the United Kingdom of Great Britain and Northern Ireland, para. 27. More notably, the Independent Commissioner for the Holding Centres, Sir Louis Blom-Cooper, has called for the immediate closing of Castlereagh stating: "Each day that passes, the Government is in breach of its obligations to comply with the minimum standards for prisoners". See Fourth Annual Report of the Independent Commissioner for the Holding Centres (Police Offices) (Belfast: ICHC, 10 March 1997).

31/ The Diplock courts derive their name from Lord Diplock, who chaired a commission established in 1971 to review criminal justice in Northern Ireland whose recommendations led directly to the repeal of the Special Powers Act and the passage of the EPA.

32/ In a report issued by the Criminal Justice Policy Division of the Northern Ireland Office concerning a Criminal Justice Conference held from 16-17 October 1997, it is noted that "[s]ince 1992/3 there had been a progressive fall in Catholics' confidence in the fairness of the criminal justice system. When considering whether both sides of the community were treated fairly in regard to terrorist and other sectarian crime, Protestant confidence levels were above 80 per cent but almost half of Catholics believed there was not equal treatment". Report, Northern Ireland Criminal Justice Conference, 16-17 October 1997, p. 6.

33/ *Rights Brought Home: The Human Rights Bill*, Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty, October 1997 (CM 3782).